3. *Civil Suit where defendants successfully recovered $3760 from plaintiff (Exhibit D4).* This was a judgment given against the plaintiff on August 17, 1972. There is nothing in that proceeding to show the misconduct of the plaintiff. In any event the proceeding took place after the publication of the libel and is again not relevant — *Duncan & Neill* on Defamation at 137 paragraph 18.16.

In assessing this damage I take into consideration that the plaintiff was an average salesman earning a salary of $250 per month including commissions earned. He was a man of good reputation and that consequent to the libel published against him, causing him injured feelings, his reputation has also been affected in some degree for the last ten years. I have also considered the trend of present inflation. In these circumstances, in my view a sum of $50,000 is a fair and reasonable compensation for this serious libel.

There is no evidence showing that the plaintiff's loss of employment opportunities was the direct result of this libel. There is therefore no special damage awarded.

In the result there will be judgment for the plaintiff with costs.

Claim allowed.

Solicitors: *Thomas & Co.; Battenberg & Talma.*

PUBLIC PROSECUTOR v. HA JONG RU

[A.Cr.J. (Tan Chiaw Thong J.) May 13, 1980]
[Sibu — Criminal Appeal No. 3 of 1980]

Gaming — Lottery tickets — Possession — Respondent caught riding bicycle with bicycle bag containing lottery tickets or record of stakes — Burden of proof on prosecution to prove possession — Criminal Procedure Code, s. 173(f) & (h) — Gambling Ordinance (Cap. 138), s. 4(c).

Criminal Law and Procedure — Possession of gambling documents — Burden of proof on prosecution — Prosecution to establish case "beyond all reasonable doubt" — Criminal Procedure Code, s. 173(f) & (h) — Gambling Ordinance (Cap. 138), s. 4(c).

The respondent in this case was charged in the lower court for assisting in carrying on a public lottery contrary to section 4(d) of the Gambling Ordinance (Cap. 138). The facts revealed that two police officers, *M.* & *T.* were lying in wait for the respondent who came on a bicycle from the direction of Sungei Merah. On seeing her *M.* came out of his ambush position and stopped her. The respondent refused to stop and *M.* gave chase. Having finally stopped her, he identified himself as a police officer and the respondent still tried to escape. He gave chase and finally caught up with her. At that time, the respondent was shivering and looked pale. *M.* made a check of the bicycle bag and found in it documents which seemed to be either lottery tickets or a record of stakes or wages in relation to a lottery.

The lower court at the end of the case for the prosecution acquitted and discharged the respondent because it found that possession had not been proved by the prosecution against her. The prosecution appealed against the lower court's decision.

Held, dismissing the appeal: (1) there is no presumption of possession contained in the Gambling Ordinance against an accused person. It falls squarely upon the prosecution to prove possession against the accused;

(2) there was no evidence to indicate that the respondent had the sole custody and control of the bicycle including the bicycle bag;

(3) bearing in mind the strict proof of possession required of the prosecution, the lower court was right in holding that the prosecution had not succeeded in proving possession against the respondent.

Cases referred to:-

(1) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237, 239.

(2) *Public Prosecutor* v. *Foo Jua Eng* [1966] 1 M.L.J. 197.

(3) *Tan Seng Chay & Anor.* v. *Public Prosecutor* Kota Bharu Criminal Appeal No. 9 of 1968 *(unreported)*.

(4) *Public Prosecutor* v. *Omar Lopez* [1967] 2 M.L.J. 281.

(5) *Tan Ah Ting* v. *Public Prosecutor* [1974] 2 M.L.J. 37.

[Editorial Note: The learned judge held that *Public Prosecutor* v. *Omar Lopez* was no longer authority on the test as to what constitutes a *prima facie* case against an accused person in the light of the existing Criminal Procedure Code.]

CRIMINAL APPEAL.

Abdul Khalid bin Manaff (Deputy Public Prosecutor) for the appellant.

Robin Hii for the respondent.

Cur. Adv. Vult.

Tan Chiaw Thong J.: This is an appeal by the Public Prosecutor against the order of acquittal of the respondent by the lower court on a charge alleging that the respondent had assisted in carrying on a public lottery contrary to section 4(c) of the Gambling Ordinance (Cap. 138).

The facts are simple and are as follows. At about 2.00 p.m. on November 7, 1976, as a result of instruction from his superior officer, PW1 Corporal Mohd. Hasbie together with a P.C. Tawau lay in wait along Queensway (Jalan Tun Haji Openg) near the R.T.M. Building for the respondent who later came on a bicycle from the direction of Sg. Merah. On seeing her, PW1 came out of his ambush position and stopped her. The respondent refused to stop and PW1 gave chase. Having finally stopped her, he identified himself as a police officer and the respondent still tried to escape. He gave chase and finally caught up with her about 10 yards away. At that time, the respondent was shivering and looked pale. PW1 made a check of the bicycle bag and found in it documents which, on the evidence given by PW3 Inspector Anthony Chee, it would seem clear to be either lottery tickets or are a record of stakes or wagers in relation to a lottery.

The sole issue raised in this appeal is the question as to whether in the circumstances as disclosed in the evidence in the lower court, it can be said that the respondent was in possession of the documents found by PW1 in the bicycle bag. It was submitted by the learned Deputy Public Prosecutor that on the evidence adduced by the prosecution the facts showed that the respondent was in possession of these documents. He pointed out that the circumstances as to the finding of these documents and the conduct of the respondent pointed to this conclusion. Learned counsel for the respondent contended otherwise and argued that the prosecution had adduced no evidence of the ownership and use and control of the bicycle and

there was no evidence to show that the bicycle bag was at all material times locked. He further submitted that the conduct of the respondent in the circumstances of being stopped and confronted by the policemen did not show guilty conscience on her part having regard to the fact that she was only 16 years old.

In the lower court the learned trial Magistrate at the end of the case for the prosecution acquitted and discharged the respondent because she found that possession had not been proved by the prosecution against her. She was not satisfied that it had been proved by the prosecution that the respondent had knowledge of the documents found in the bicycle bag and of their nature. She stated at page 3 of the judgment: —

"I accept as of fact that the incriminating exhibits were seized from the bicycle but the prosecution did not at any stage adduce evidence as to the ownership of the bicycle. They had not proved that the accused person had the sole use or control of the bicycle, least the bicycle bag. It is a common knowledge that bicycle is a very accessible type of vehicle unlike motor cars, it does not have windows or doors which can be locked to the exclusion of other users. Bicycle bags are so designed that they can never be locked as lockers can to exclude use or interference by other people. In view of this coupled with the fact of the prosecution failure to prove ownership of the bicycle in question, it is my considered opinion that neither the bicycle nor its bag was under the control, be it exclusive of or physical, of the accused and therefore had no exclusive power to dispose of it. It is a reasonable inference that someone else could have placed the incriminating exhibits in the bicycle bag without the knowledge of the accused."

It is to be observed that there is no presumption of possession contained in the Gambling Ordinance against an accused person. It falls squarely upon the prosecution to prove possession against the accused. In the case of *Chan Pean Leon* v. *Public Prosecutor,*[1] Thomson J. (as he then was) in his judgment stated: —

"In my experience there is no question which Magistrates find more difficult to deal with than this question of what amounts to 'possession' for the purposes of the criminal law. Much of this difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the maxim *actus non facit reum nisi mens sit rea* is whether he had knowledge of the nature of the thing possessed."

Then later at the same page, he stated: —

"To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi.* Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances made out such intention is a question of fact in each individual case."

Further on at the same page, he stated: —

"Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea.* And for this purpose as was pointed out by Gordon-Smith Ag. C.J. in the case of *Toh Ah Lam and Mak Thim* v. *Rex* [1949] M.L.J. 54, it is necessary to prove that the person in possession knows the nature of the thing possessed."

As stated, the evidence adduced by the prosecution showed that the respondent at the material time was cycling on a bicycle at the rear of which the incriminating documents were found in a bicycle bag. The prosecution did not go any further. The learned Deputy Public Prosecutor has cited the case of *Public Prosecutor* v. *Foo Jua Eng*[2] as a case analogous to the instant case. However, on examining the facts of the *Foo Jua Eng's* case, it seems clear that the facts there were not identical. Whereas in the instant case the incriminating documents were found in the bicycle bag, and it is common knowledge that a bicycle bag has a cover and is not sited at the front of the bicycle but at its rear, in the *Foo Jua Eng's* case the incriminating documents were found some three feet away from the accused, on a dressing table, implying of course that it was lying in the open and not, for example, in the drawer of the dressing table. In that case the appeal by the Public Prosecutor was allowed *inter alia* because the appellate court found that the lower court did not direct its mind adequately on the facts including the circumstances about the physical proximity of the respondent to the exhibits. As stated, the fact that the incriminating documents were found in the bag which had a cover is not identical to the fact that the incriminating exhibits in the *Foo Jua Eng's* case were found openly on the dressing table some three feet away from the respondent. I do not consider therefore that the *Foo Jua Eng's* case is authority to show that the facts in that case may be considered as identical to those in the instant one. The learned Deputy Public Prosecutor has submitted further that the conduct of the respondent showed that she had knowledge of the documents found in the bicycle bag and of their nature. He had cited the case of *Tan Seng Chay & Anor.* v. *Public Prosecutor,*[3] in support of his submission. However, the facts in that case again are not identical to those of the instant one. In that case, the two appellants were charged with, *inter alia,* the theft of a motor-cycle under section 379 of the Penal Code. The facts as outlined in the judgment of the appellate judge are as follows. The owner of a motor-cycle after a cinema show parked his motor-cycle near a mee stall where he had mee. After about 20 minutes he found his motor-cycle missing. He made a search but could not find it. He immediately lodged a report. Some police constables on rounds were alerted. About an hour after the report had been made three constables on rounds saw the motor-cycle in the car park of a cinema some distance away from where the owner had parked it. The constables lay in wait. After about 5 minutes they saw the first appellant pushing the motor-cycle from the car park onto the main road. The second appellant was following him. As the first appellant was about to start the motor-cycle the three police constables moved forward and stopped the two appellants. PW4, one of the police constables, showed his authority card and asked the appellants to accompany them to the police station. The first appellant straightaway punched this police constable. The second appellant hit another. A scuffle ensued. A crowd collected. The police officers over-powered the appellants and took them with the motor-cycle to the police station. The appellate court found that in the circumstances of the case the appellants were in possession of the motor-cycle and their intention in hitting at the police officers when they were caught with the motor-cycle was to create a disturbance amidst a

crowd so that they might escape in a commotion that might have ensued, and their conduct in that respect pointed to nothing else but their guilt. In the instant case the circumstances were that PW1 had been lying in wait then running out of his ambush position and trying to stop the respondent. She did not stop, so he gave chase after her. When he finally stopped her, he identified himself as a police officer. She tried to escape. He gave chase and finally caught up with her. At that time, she was shivering and looked pale. Is this conduct by itself sufficient to prove legal possession of the incriminating documents against the respondent? Is it the only and irresistible inference that the conduct of the respondent showed that she was in possession of the incriminating documents bearing in mind the fact that possession in the sense as had been indicated earlier must be proved by the prosecution beyond any reasonable doubt against the respondent? To my mind, although the conduct of the respondent in this case may be said to be highly suspicious, I do not consider however that, without more, it is sufficient to go beyond the line of strong suspicion and cause it to be at the stage where it can be said that the prosecution, merely by the conduct of the respondent, has proved possession in law against her. In this case, had the prosecution gone further and proved that the respondent had sole custody and control of the bicycle, then this, coupled with the fact of the conduct of the respondent, may probably raise an irresistible inference against her that she had possession of the incriminating documents. But what evidence is there regarding the relationship between the respondent and the bicycle? There is none beyond the evidence that she was, at the material time, riding on it. In any event, there is no evidence to indicate that the respondent had the sole custody and control of the bicycle including the bicycle bag. In the circumstances and bearing in mind the strict proof of possession required of the prosecution, I do not consider that the lower court had erred in holding that the prosecution had not succeeded in proving possession against the respondent and in the circumstances the appeal against the order of acquittal of the respondent is dismissed.

In deciding whether, at the end of the case for the prosecution, a *prima facie* case had been made out against the respondent, the learned trial Magistrate cited the case of *Public Prosecutor* v. *Omar Lopez*.[4] I would point out that the relevant provisions of the Sarawak Criminal Procedure Code dealt with by that case have been replaced by those in the existing Criminal Procedure Code, and hence that case should, in my view, no longer be considered as authority on the present test as to what constitutes a *prima facie* case against an accused person. The wording of section 173(f) and (h), Criminal Procedure Code is different. In this connection, attention is drawn to the case of *Tan Ah Ting* v. *Public Prosecutor*,[6] the headnote of which reads: —

"The effect of section 173(f) of the Criminal Procedure Code is that it is the duty of a magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond all reasonable doubt.

Before calling upon the defendant to make his defence, the court has only to be satisfied that the prosecution has made out a *prima facie* case.

The meaning of the expression "*prima facie*" case/evidence generally accepted by the courts is where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence."

Appeal dismissed.

Solicitors: *Robin Hii & Co.*

ALWEE v. LAI KONG FOOK & ORS.

[O.C.J. (Abdoolcader J.)
March 6, 7, May 13, 14, & June 3, 1980]
[Ipoh — Civil Suit No. 346 of 1976]

Contract — Oral agreement for sale of land — Specific performance — No binding contract — Land sold to third party who had no notice of earlier contract — Damages only remedy.

Practice and Procedure — Pleadings — Evidence not supporting allegations in pleadings.

In this case the plaintiff claimed specific performance of an oral agreement allegedly entered with the first and second defendants for the sale of certain premises. He alleged that the premises had contrary to the agreement been transferred to the third defendant and he claimed in the alternative damages against the third defendant and an order to cancel the transfer to him. According to the pleadings it was alleged that the first and second defendants agreed to sell the premises to the plaintiff. The plaintiff lodged a caveat against the property and obtained an order restraining the Registrar of Titles from registering the transfer in favour of the third defendant.

Held: (1) the evidence adduced in this case showed that there was no oral agreement as alleged between the plaintiff and the first and second defendants and therefore the claim must be dismissed;

(2) on the facts the third defendant had no notice of the alleged agreement;

(3) the order restraining the Registrar of Titles from registering the transfer of the premises in favour of the third defendant must be discharged.

Cases referred to:-

(1) *Farrell* v. *Secretary of State for Defence* [1980] 1 W.L.R. 172, 180.

(2) *Ong Chat Pang & Anor.* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224, 227.

CIVIL SUIT.

W.S.W. Davidson for the plaintiff.

Colin R. Clark for the defendant.

Cur. Adv. Vult.

Abdoolcader J.: The plaintiff claims in these proceedings specific performance of an oral agreement allegedly entered into with the 1st and 2nd defendants for the sale to him of the premises known as No. 1 Jalan Alma Bakar, Batu Gajah ('the premises'), and further and in the alternative damages against them, and as against the 3rd defendant he seeks an order to cancel the transfer of the premises executed in his favour by the 1st and 2nd defendants.

At the outset counsel on both sides agreed that two issues arise for determination, namely, (1) whether there was a legally binding contract between the